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No. 85-1933

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

BOUND BROOK ASSOCIATION, *et al.*,
Petitioners,

vs.

CITY OF NORWALK, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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85-P

Question Presented for Review

Did the Connecticut Supreme Court violate the petitioners' right to due process as secured by the Fourteenth Amendment to the Constitution of the United States by reversing a jury verdict in favor of the petitioners solely on factual determinations?

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Brown, We Hold These Truths (1st ed. 1941) 18

Commager, Documents of American History (1st ed. 1934) 19

DeToqueville, Democracy In America (Phillips Bradley Ed. 1948) 20

Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 Stan. L. Rev. 5 (1949) 23

Holmes, Collected Legal Papers (1st ed. 1920) 25

Hyman and Torrant, "Aspects of American Jury Trial History" in Simon, The Jury System In America (1st ed. 1975) 18

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NO.

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OCTOBER TERM, 1985.

BOUND BROOK ASSOCIATION, *et al.*,

Petitioners,

vs.

CITY OF NORWALK, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI.

The petitioners[1] respectfully pray that a writ of certiorari issue to review the decision of the Connecticut Supreme Court dated February 18, 1986 and the denial of the petitioners' Motion to Reargue dated March 4, 1986.

[1]The petitioners are: Fernand Andre, Lea Andre, Raymond Bonefant, Linda Bonefant, Ferdinand Caban, Marie Caban, John Charity, Mary Charity, William Chiappetta, Paula Chiappetta, Arline Ciafullo, Ronnie Coley, Mary Coley, Curtis Collins, Mary Collins, Edward Crozier, Moses Davis, Lila Davis, Carlo DeMichael, Carolyn DeMichael, Angelo DiMeglio, Ester DiMeglio, Carl Dulberg, Janice

(Footnote continued on following page.)

Opinions Below.

The decision of the Connecticut Supreme Court is reported at 198 Conn. 660, ____ A.2d ____ (1986), and is set forth in the appendix (1a). The order denying the petitioners' Motion to Reargue was issued by the Connecticut Supreme Court without opinion and was not reported (12a).

Jurisdiction.

The decision of the Connecticut Supreme Court is dated February 18, 1986 and the denial of the petitioners' Motion to Reargue is dated March 4, 1986. Jurisdiction to review the judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. §1257(3).

(Footnote continued.)
Dulberg, Sara Gerardi, Jorge Gonzales, Martha Gonzales, Celestino Heres, Elsa Heres, Nathan Housey, Timothy Hushion, Patricia Lockwood, Salvatore Ieva, Jeanne Ieva, Andras Kenderisi, Helen Kenderisi, Allen Knox, Elizabeth Knox, Carl Lewis, Althea Lewis, Frank Lopresti, Ann Lopresti, Juan Loquine, Miriam Loquine, Richard Marcy, Mary Ann Marcy, Augustus Moore, Jr., Carri Moore, James Mouzon, Hilda Mouzon, David Nial, Susan Nial, Elizabeth Page, Marie Passaniti, Jane Reichle, Jack Robertino, Josephine Robinson, William Rouzier, Sharon Rouzier, Anthony Sabia, Dorothy Sabia, John Santagata, Sonia Santagata, Louis Sciglimpaglia, Jo Ann Sciglimpaglia, Donnie Sellers, Arneita Sellers, Cane Shaw, Viola Shaw, William Summerville, Thelma Summerville, Njall Svege, Alice Svege, Charles Taylor, Jr., Kathleen Troy, Charles Vines, Hattie Vines, Palmer Ware, Brenda Ware, Levi Whittingham, Simeriah Whittingham, Joan Zurell.

The respondents are: The City of Norwalk, Connecticut and William R. Guarnieri (hereinafter sometimes collectively referred to as "the respondents").

The other defendants in the action Bound Brook Association, *et al.* v. City of Norwalk, *et al.* are Bound Brook Estates, Inc., Raymond Wennik, Harry E. Bryan and Louis J. Gardella, Inc.

A settlement was reached with Bound Brook Estates, Inc. and Raymond Wennik during the pendency of the appeal. Harry E. Bryan died prior to trial and his executors were substituted as defendants. The substituted defendants failed to appear at trial, a default was entered and a hearing in damages was held by the trial court. The jury returned a verdict in favor of Louis J. Gardella, Inc.

Provisions Involved.

Constitution of the United States, Amendment XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Connecticut
Article 1, Section 19

The right of trial by jury shall remain inviolate.

Conn. Gen. Stat. §52-595. Fraudulent concealment of cause of action.

If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Statement of the Case.

The petitioners commenced this action against the City of Norwalk, William R. Guarnieri, Bound Brook Estates, Inc., Raymond Wennik, Louis J. Gardella, Inc. and Harry E. Bryan based on common law tort. The petitioners' homes in Bound Brook Estates, Norwalk, Connecticut are structurally defective and are sinking. (See representative photographs in Appendix at 14a, 15a.) The untreated wood pilings supporting the houses do

not comply with the Basic Building Code of the State of Connecticut (hereinafter "the Building Code").

Bound Brook Estates is an inter-racial, multi-ethnic community in Norwalk, Connecticut.[2] Many of the petitioners are first time homeowners who have worked hard for a home of their own. When they purchased their homes in Bound Brook Estates, the petitioners thought they were buying a piece of the American dream, a house with a yard in a suburban development; a house certified by the City of Norwalk as built in compliance with the Building Code; a mortgagable investment for the future; a home. The petitioners' dreams have turned to disappointment. The petitioners now find themselves, after a strange legal odyssey, petitioning the United States Supreme Court for justice.

Respondent Guarnieri was the Chief Building Inspector of the City of Norwalk from 1958 until 1977. Raymond Wennik is the President of Bound Brook Estates, Inc., the builder of the petitioners' homes. Louis J. Gardella, Inc. was the pile driver on the Bound Brook job. Harry E. Bryan was a professional engineer retained by Bound Brook Estates, Inc.

In and around 1965, Wennik and Bound Brook Estates, Inc. acquired a tract of undeveloped land in the City of Norwalk. Portions of the tract were composed of soft, wet, marshy, shifting and unstable soils. The site has a variable or fluctuating water table.

The Planning Commission and Common Council of the City of Norwalk approved a subdivision of the tract into residential building lots (hereinafter "the Bound Brook subdivision"). After the approval of the subdivision, Bound Brook Estates,

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[2]The U.S. Department of Commerce reports that the Norwalk Standard Metropolitan Statistical Area ("SMSA") has the third highest housing costs in the nation after the Stamford, Connecticut SMSA and the Honolulu, Hawaii SMSA.

Inc. placed substantial amounts of fill in the swampy areas of the site in anticipation of constructing roads and houses in the subdivision.

Raymond Wennik determined with the assistance of Harry E. Bryan that many of the houses in the Bound Brook subdivision would have to be constructed on pilings. Wennik, Respondent Guarnieri and Bryan met at the offices of the Building Department of the City of Norwalk prior to the commencement of construction for the purpose of discussing the construction of the houses in the Bound Brook subdivision. At the meeting, Respondent Guarnieri approved the use of untreated wooden pilings. No boring tests were conducted, no soils tests were made and no determinations were made concerning the level of the ground water on the site.

Each of the petitioner's houses is constructed on thirteen untreated wooden pilings. The records of the Building Department of the City of Norwalk document that a building permit was issued, that footing and foundation inspections were conducted by an employee of respondent City of Norwalk and that a certificate of occupancy was issued for each of the petitioner's houses.

At trial, the petitioners presented the testimony of a number of expert witnesses, including two professional engineers specializing in soils and soils engineering—Lawrence Buckley and David Thompson.

Mr. Buckley testified that it would be unacceptable to use untreated timber pilings, if the pilings were to extend above the water table, and that untreated wooden pilings should not be used where there is a changing water table. Mr. Buckley observed several of the pilings at the Bound Brook subdivision in 1977 and again in 1982. In discussing his observations, Mr. Buckley stated that the pilings were untreated wood, extended above the water table and some showed visible evidence of decay. He stated that the use of untreated wooden pilings to support a house in a situation where those pilings extended

above the water table would be a substantial factor in the creation of a structural problem relating to the house. Mr. Buckley recommended that all of the petitioners' houses constructed on untreated wooden pilings be repiled.

Mr. Thompson discussed the three reasons for the decay of an untreated timber piling—bacterial action, attack by fungi and attack by insects. When an untreated wooden piling decays, the strength of the wood is broken down and the piling loses its ability to support a load. In Mr. Thompson's opinion, the pilings supporting the petitioners' houses will have a useful life of 14 to 25 years. If even one of the thirteen pilings supporting each of the petitioner's houses decays, the house will settle, cracks will develop and the framing will distort.

In 1969, Wennik discovered that four of the houses in the Bound Brook subdivision showed signs of settlement. Three of these houses were removed from their foundations, and new piles were driven. One of the houses was repiled twice, the second time with steel piles. Respondent Guarnieri knew about the repiling of the houses. While the repiling of a house would require a building permit, no permits were issued for the repiling at Bound Brook.

The petitioners purchased their houses in the Bound Brook subdivision between 1969 and July, 1977. A member of each of the petitioner households testified that they purchased the land and structures which are the subject of this action as a primary residence for themselves and their families. The petitioners were shown their homes by various members of the Norwalk Board of Realtors. Each of the petitioners obtained mortgage financing to assist him with the purchase of his home. Each of the petitioners had an inspection of the premises made by a professional house inspector or relied on his mortgage lender to conduct an inspection. Each of the petitioners used the services of an attorney to assist him with the purchase of his home.

In September 1976, the ground floor of the house at 24 Southwind Drive owned by a family named Mazzello (not in-

volved in this action) collapsed. The house was declared unsafe by the City of Norwalk, and the owners were required to vacate the structure. After the collapse of the Mazzello house, certain of the petitioners asked the Common Council of the City of Norwalk to conduct an engineering study of the houses in the Bound Brook subdivision. The petitioners wanted the engineering study in order to demonstrate that their houses were structurally sound and to show that the failure of the Mazzello house was an isolated occurrence.

The City of Norwalk retained Lawrence Buckley, P.E. to conduct a study of the houses in the Bound Brook subdivision. Mr. Buckley submitted his report to the Health Welfare and Public Safety Committee of the Norwalk Common Council on October 6, 1977.

Petitioners commenced this action by complaint dated September 19, 1978. The petitioners claimed that the defendants City of Norwalk, Guarnieri, Bound Brook Estates, Inc., Wennik and Bryan were liable for negligence, negligent nuisance, absolute nuisance and fraudulent representations and reckless misrepresentations. The plaintiffs claimed that defendant Louis J. Gardella, Inc. was liable for negligence, negligent nuisance and absolute nuisance.

The respondents, by special defense, alleged that the petitioners' claims were barred by the statute of limitations.[3] The petitioners, in reply thereto, claimed that the respondents con-

[3]The Connecticut Statute of Limitations (Sections 52-577 and 52-584 of the Connecticut General Statutes) requires that an action be commenced within three years from the act or omission complained of. The Connecticut statute is a statute of repose and the statute can run before a plaintiff discovers the existence of a cause of action. *See e.g. McDonald v. Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646 (1984).

The Connecticut Statute of Limitations was criticized by the Second Circuit Court of Appeals in *Ricciuti v. Voltarc Tubes, Inc.*, 277 F. 2d 809 (2d Cir. 1960). In *Ricciuti,* the plaintiff was exposed to beryllium dust from 1944 to 1948. In 1953, the plaintiff contracted berylliosis.
(Footnote continued on following page.)

cealed the existence of petitioners' causes of action.[4]

Jury selection started on September 13, 1982 and lasted ten weeks. On November 19, 1982, the jury was sworn and testimony began.

On February 14, 1983, after more than three months of trial and the testimony of more than 70 witnesses, the Court instructed the jury. At the conclusion of its charge, the Court submitted interrogatories to the jury. The jury's responses to these interrogatories provide an opportunity to observe the jury's thinking and to understand the rationale for their verdict. Moreover, the consistency of the jury's responses to the Court's interrogatories demonstrates the depth of their understanding of the issues in this case. Interrogatories were returned by the jury for each petitioner household. (Representative interrogatories are reprinted in the Appendix at 16a.)

(Footnote continued.)
The disease was diagnosed in January 1956, and the plaintiff brought suit in December 1957. The Court of Appeals, in interpreting the Connecticut statute of limitations, held:

> We think it is unreasonable to hold that the statute of limitations begins to run against an injured person at a time when he does not in fact know and could not with the exercise of reasonable care and diligence, know what his injury is. To so hold would nullify any right to recover for any serious but slowly developing diseases.

Id. at 813.

[4]Section 52-595 of the Connecticut General Statutes enables a plaintiff who can plead and prove fraudulent concealment to avoid the harshness of the statute of limitations. Section 52-595 states:

> If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

After ten days of deliberation and after completing over 5,000 interrogatories, the jury returned a verdict in favor of the petitioners against the respondents City of Norwalk and William R. Guarnieri, defendant Bound Brook Estates, Inc. and defendant Raymond Wennik. The jury returned a verdict in favor of Louis J. Gardella, Inc. The jury awarded each of the 47 petitioner households compensatory damages ranging from $8,000.00 to $61,231.00.

The defendants' motions to set aside the verdict and to enter judgment notwithstanding the verdict were denied and the trial court entered judgment in favor of the petitioners.

On appeal, the Connecticut Supreme Court set aside the judgment and remanded the case to the trial court with instructions to render judgment in favor of respondents City of Norwalk and Guarnieri. The Connecticut Supreme Court found that the jury could not have reasonably concluded that the respondents had intended to conceal from the petitioners the existence of the petitioners' causes of action. The Connecticut Supreme Court held that lacking a demonstration of an intent to conceal the petitioners' causes of action, there could be no proof of fraudulent concealment pursuant to Section 52-595 of the Connecticut General Statutes. Without proof of fraudulent concealment, the Connecticut Supreme Court determined that the statute of limitations barred the petitioners' causes of action.

The petitioners respectfully submit that the Connecticut Supreme Court has invaded the fact finding prerogatives of the jury and has denied the petitioners' fundamental rights as secured by the Fourteenth Amendment to the Constitution of the United States.

This issue was raised before the Connecticut Supreme Court on a motion to reargue after the Connecticut Supreme Court overturned the petitioners' jury verdict. The petitioners' motion to reargue was denied without opinion. Accordingly, this Court has jurisdiction over the issues raised herein. *See e.g. Aetna Life Ins. Co. v. Lavoie,* No. 84-1601 (April 22, 1986), ____ U.S. ____ (1986).

In Connecticut, it is well settled that the determination of a question of fraudulent intent "is clearly an issue of fact which must often be inferred from surrounding circumstances." "Such a fact is not ordinarily proven by direct evidence, but rather, by inference from other facts proven—the indicia or badges of fraud." *Zapolsky v. Sacks,* 191 Conn. 194, 200, 464 A.2d 30 (1983). In *Zapolsky v. Sacks,* 191 Conn. at 201, the Connecticut Supreme Court concluded that "a factual finding based on inferences reasonably drawn from the evidence will stand."

As the Connecticut Supreme Court stated in *DeLuca v. C.W. Blakeslee Sons, Inc.,* 174 Conn. 535, 546-7, 391 A.2d 170 (1978):

> The intent to defraud involves a state of mind and "must usually, as was the case here, be proven by circumstantial evidence." *Busker v. United Illuminating Co., supra,* 459; *Paul Bailey's, Inc. v. Commissioner of Motor Vehicles,* 167 Conn. 493, 498, 356 A.2d 114. As we noted in *State v. Vars,* 154 Conn. 255, 263, 224 A.2d 744: " 'A question of intent is a question of fact, the determination of which is not reviewable unless the conclusion drawn by the trier is one which cannot reasonably be reached.' *International Brotherhood v. Commission on Civil Rights,* 140 Conn. 537, 543, 102 A.2d 366. Intention is a mental process and of necessity it must be proved by the statement or acts of the person whose act is being scrutinized. *State v. Mazzadra,* 141 Conn. 731, 735, 109 A.2d 873. 'A person's intention in any regard is to be inferred from his conduct'; *Kiernan v. Borst,* 144 Conn. 1, 6, 126 A.2d 569; and ordinarily can be proven only by circumstantial evidence. *State v. Sul,* 146 Conn. 78, 87, 147 A.2d 686."
>
> Upon conflicting evidence, it is peculiarly within the province of the trier of fact to judge the credibility of the witnesses and then draw proper inferences. *Kukanskis v. Jasut,* 146 Conn. 78, 87, 147 A.2d 686."

Similarly, in *Puro v. Henry,* 188 Conn. 301, 310-11, 449 A.2d 176 (1982) (emphasis added), the Connecticut Supreme Court stated:

> "The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence; circumstantial evidence may be sufficient." 37 Am. Jr. 2d, Fraud and Deceit §439, p. 599. *See Console v. Nickou, supra,* 275, wherein we stated: " 'The test of the sufficiency of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference. *Andrea v. New York, N.H. & H.R. Co.,* 144 Conn. 340, 344, 131 A.2d 642 (1957); *Pierce v. Albanese,* 144 Conn. 241, 256, 129 A.2d 606, appeal dismissed, 355 U.S. 15, 78 S. Ct. 36, 2 L.Ed. 21 (1957). The proof need not be so conclusive that it precludes every other hypothesis. It is sufficient if the proof produces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact to be inferred is true. *Hennessey v. Hennessey,* [145 Conn. 211, 214, 140 A.2d 473 (1958)]; *Pierce v. Albanese, supra*; *Dickson v. Yale University,* 141 Conn. 250, 253, 105 A.2d 463 (1954, and cases cited.' *Cayer v. Salvatore,* 150 Conn. 361, 364, 189 A.2d 505 (1963)."
>
> *Each inferential fact need not be proven by the quantum of proof required to find the ultimate fact. If the jury could reasonably have reached the conclusion that the cumulative effect of the facts they found proven established the fraudulant concealment that would be sufficient. Cf. State v. Hayes,* 127 Conn. 543, 554, 18 A.2d 895 (1941); *State v. Olavieri,* 123 Conn. 678, 679-80, 195 A. 181 (1937); see also, *State v. Johnson,* 162 Conn. 215, 231-32, 292 A.2d 903 (1972); *State v. Gallivan,* 75 Conn. 326, 329, 53 A. 731 (1902).

It is within the province of the jury to draw reasonable and logical inferences from the facts proven. *See Dacey v. Connecticut Bar Assn.*, 170 Conn. 520, 540, 368 A.2d 125 (1976).

On innumerable occasions, it has been stated by the Connecticut Supreme Court that the Court cannot retry facts or pass on the credibility of witnesses. *See Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 422, 446 A.2d 799 (1982). The credibility of witnesses and the weight to be accorded to the evidence are within the province of the trier of fact. *See Leabo v. Leninski,* 182 Conn. 611, 616, 438 A.2d 1153 (1981).

Moreover, the decision of the trial court in refusing to set aside the verdict or to enter judgment notwithstanding the verdict is entitled to great weight. The Connecticut Supreme Court has consistently held that:

> The concurrence of the judgments of the judge and the jury who saw the witnesses and heard the testimony, is a powerful argument for sustaining the action of the trial court.

See Sauro v. Arena Co., 171 Conn. 168, 169, 368 A.2d 58 (1976). The conclusion of the judge who presided at the trial and denied a motion to set aside the verdict is significant because the trial judge had an opportunity "to evaluate the evidence and to sense the tenor of the trial." *Kalleher v. Orr,* 183 Conn. 125, 127, 438 A.2d 843 (1981).

The jury had before it clear, precise and unequivocal evidence from which it could reasonably infer the respondents' intent to conceal the petitioners' causes of action. The jury heard the following evidence and made a finding of intent to conceal:

1. The Bound Brook site was composed of wet, marshy, shifting and unstable soils. This condition was evident to even a casual observer.

2. The City Planning Commission, the City Engineer and the Building Department of the City knew that the Bound Brook site had building limitations.

3. Respondent Guarnieri was so familiar personally with the site that he called a meeting with developer Raymond Wennik and his engineer, Harry E. Bryan, to discuss the foundations necessary to support the petitioners' homes.

4. While respondent Guarnieri had no formal training in architecture and engineering, it took no special training for him to know that the Bound Brook site required special care.

5. Respondent Guarnieri knew the provisions of the Building Code as it related to piled foundations. During his testimony, holding a copy of the Building Code to his breast, he looked at the jury and told them that the Code was "his Bible."

6. At the meeting that respondent Guarnieri called with Messrs. Wennik and Bryan, the use of untreated piles to support the petitioners' homes was approved.

7. The Building Code required in simple, mandatory language that an obvious swamp like the Bound Brook site had to be investigated prior to permitting construction. The Code required, among other things:

a) investigation of subsurface soil conditions through test borings. Section 724 and 736.1 of the Building Code.

b) that untreated pilings be below the level of the water table. Section 730.4 of the Building Code.

c) that treated pilings be used if the pilings would extend above the ground water level. Section 738.5 of the Building Code.

8. None of the building files or the Building Department records contained the required tests. The jury knew that, in fact, no such tests had been made.

9. The jury knew that respondent Guarnieri did not require any tests despite the requirements of the Building Code, despite his knowledge of the requirements, and most importantly, despite his personal knowledge that the Bound Brook site required that these provisions of the Code be applied.

10. Respondent Guarnieri knew that unless the provisions of the Building Code were strictly applied to the Bound Brook site, the foundation for the petitioners' homes would be structurally deficient.

11. The Building Code and local practice mandated that the City Building Department make periodic inspections. The inspectors working under respondent Guarnieri failed to conduct inspections regarding footings and foundations.

12. Norman Waldron, an inspector who worked under respondent Guarnieri, made over 400 inspections at the Bound Brook site during construction. Yet, when Waldron was asked about the type of pilings used and the piling activity at Bound Brook, he repeatedly testified "I know nothing about pilings whatsoever."

13. When problems developed with certain of the houses at Bound Brook, the respondents allowed Raymond Wennik to repile the houses without the required building permits for the repiling.

14. The respondents issued Certificates of Occupancy for the petitioners' homes certifying that the houses had been constructed in substantial compliance with the Building Code when the respondents knew or should have known that the houses had not been built in accordance with the Building Code.

15. The Certificates of Occupancy represented to the petitioners and to their mortgage lenders that the houses met the requirements of the Building Code.

16. When the jury looked at all the evidence—respondent Guarnieri's knowledge that Bound Brook was a swamp—that piles were necessary—that the Building Code mandated that all manner of tests be made—that none of the tests were made—that right after respondent Guarnieri issued Certificates of Occupancy, the houses began to sink—that respondent Guarnieri had to know it—that respondent Guarnieri kept quiet and let the developer try to cover his tracks—that respondent Guarnieri did absolutely nothing until he absolutely had to, when a house collapsed in 1976—the jury could have reasonably found that respondent Guarnieri knew the facts, knew what was wrong, and intentionally concealed the problems from the petitioners.

Based on the foregoing clear, precise and unequivocal evidence, and after observing the demeanor of the witnesses, the jury reasonably found that the respondents intended to conceal from the petitioners the knowledge that their homes were not built in compliance with the Building Code and intended to conceal from the petitioners that the respondents had been negligent, had created a nuisance and had made fraudulent representations and reckless misrepresentations to the petitioners.

The Connecticut Supreme Court has restricted those occasions when a Connecticut appellate court can upset a jury verdict which has been accepted by the trial court. An appellate tribunal in Connecticut will disturb a jury verdict only when it is *clearly* against the evidence or when the verdict's manifest injustice is so plain that prejudice or corruption is apparent. *See Frankovitch v. Barton,* 185 Conn. 14, 16, 440 A.2d 254 (1981) and cases cited therein. The Connecticut Supreme Court has further mandated that the evidence must be given the most favorable construction possible in support of a jury verdict. *Id.*

The sole factual question on appellate review is whether reasonable minds *could* have concluded as did the jury. *See Tomczuk v. Alvarez,* 184 Conn. 182, 185, 439 A.2d 935 (1981).

It must be presumed that these pronouncements are not hollow statements by the Connecticut Supreme Court but are, rather, an attempt to accord fundamental rights to those seeking relief in the courts of the State of Connecticut. Yet the Connecticut Supreme Court in the matter at bar did not offer any of the reasons mentioned above for disturbing the jury's findings. Instead, the Connecticut Supreme Court chose to ignore the findings of both the jury and the trial judge as well as the extensive interrogatory responses of the jury. The Connecticut Supreme Court, as evidenced at pp. 667-670 of its opinion, recast the evidence and factual findings of the jury and simply inserted, in conclusory terms, that the evidence "cannot" support the jury's findings in this matter.

The Connecticut Supreme Court has analyzed the facts of this case *de novo* and in doing so has taken pains to rationalize the respondents' failings and to ascribe a salutary or, at least, innocent motive to each of the respondents' actions. Moreover, the Court viewed each fact individually to determine whether or not each fact, in and of itself, evidenced the respondents' intention to conceal, rather than reviewing "the cumulative effect of the facts." *Puro v. Henry, supra* at 310.

The most striking example of the Court's inexplicable desire to dilute the cumulative factual findings of the jury appears in its reported decision at 198 Conn. at 668-669. (See Appendix at 9a-10a.) The Connecticut Supreme Court therein would excuse the respondents' failure to require building permits for the repiling of houses in the Bound Brook subdivision on the grounds that repiling is a noisy, public process. The petitioners submit, however, that there is no doctrine which allows a governmental official to substitute public noise for required records. Nor did the noise, which dissipated upon the completion of the repiling, provide notice to subsequent purchasers who were out of ear shot at the time of the activity. It is this type of approach by the

Connecticut Supreme Court which is indicative of the Court's improper substitution of its own factual findings for those of the jury. The result was a new trial on appeal, a result which is in blatant conflict with the Connecticut Supreme Court's lofty pronouncements on the sanctity of a jury verdict.

While the Connecticut Supreme Court may have seen the facts differently than the jury or may have sympathized with the City of Norwalk and its former building inspector, the Court had no authority to disregard the factual findings of the jury. The Connecticut Supreme Court's reasons for interdicting in a sphere specially reserved for the jury falls woefully short of the legal standards which that court itself has formulated for the upsetting of a jury verdict. When a state's highest court infringes upon individual rights guaranteed to all persons, the only recourse is to petition this Court for review. The petitioners do so here in the hope of securing justice and rectifying a glaring error from a state court which has adversely affected the petitioners' fundamental rights.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Connecticut Supreme Court reversing the jury verdict and judgment in favor of the petitioners solely on factual determinations has denied the petitioners their right to due process as secured by the fourteenth amendment to the Constitution of the United States.

A. The Right To Trial By Jury Has Historically Been Considered A Fundamental Right In Our System Of Justice

The right to trial by jury arrived in this country with the first English colonists. *See* Simon, *The Jury System In America* at 15

(1st ed. 1975). The original Jamestown Charter guaranteed all the rights of Englishmen to the colonists including trial by jury. *See* Hyman and Torrant, "Aspects of American Trial Jury History," in *The Jury System in America* at 24-25 (1975). During the next two hundred years of development in colonial America, the right to a jury trial continued to expand and the principles embodied by a jury trial found a receptive atmosphere in the egalitarian principles of the colonists. *Id.*

In a number of significant enactments issued by a variety of legislative bodies, the right to trial by jury was consistently protected and preserved in view of its status as an inviolate right to be afforded the people. In the Declaration of Resolves of the First Continental Congress, enacted on October 14, 1774, it was unanimously provided that "the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress 28.

Similarly, in the Virginia Bill of Rights, adopted by the Virginia Convention on June 12, 1776, it was provided:

> 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.

See Brown, *We Hold These Truths* at 35 (1st ed. 1941).

In the Declaration of Independence, written by Thomas Jefferson between June 10 and July 4, 1776, an important grievance cited against King George included:

For depriving us in many cases of the benefits of Trial by Jury.

See Brown, *supra* at 39.

The Declaration of the Causes and Necessity of Taking Up Arms, prepared by John Dickinson and Thomas Jefferson in July of 1775, listed as one of the bases for the colonists' revolution against Great Britain the fact that the throne had:

> * * * [deprived] us of the accustomed and inestimable privilege of trial by jury in cases affecting both life and property.

See Commager, *Documents of American History* at 93 (1st ed. 1934).

At the first session of the First Congress under the Constitution, James Madison, on June 8, 1789 while in the House of Representatives, submitted propositions to amend the United States Constitution by adding, to the clause concerning the appellate jurisdiction of the United States Supreme Court, the words, "nor shall any fact, triable by a jury, according to the course of the common law, be otherwise re-examinable than according to the principles of the common law" and, to the clause concerning trial by jury, the words: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." See Commager, *supra* at 97. These propositions were subsequently modified to the wording presently contained in the Seventh Amendment.

In *Parsons v. Bedford, et al.*, 3 Pet. 433, 7 L.Ed. 732 (1830), Justice Story, speaking for the United States Supreme Court, recognized in clear terms the fundamental nature of the right to trial by jury in civil cases:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the

> constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people.

3 Pet. at 443, 7 L.Ed. at 736. In *Jacob v. City of New York,* 315 U.S. 752, 752-53, 62 S.Ct. 854, 854, 86 L.Ed. 1166, 1168 (1942), the United States Supreme Court noted:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. *A right so fundamental and sacred to the citizen, whether guaranteed by the constitution or provided by statute, should be jealously guarded by the Courts.* (emphasis added).

The Supreme Court has further stated:

> Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603, 611 (1935) quoted with approval in *Beacon Theatres v. Westover,* 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988, 992 (1959).[5]

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[5]In his treatise entitled *Democracy In America* (Phillips Bradley Ed. 1948), DeToqueville, in a chapter entitled "Trial By Jury In The United States Considered As A Political Institution" wrote:

(Footnote continued on following page.)

It is evident that the right to a trial by jury, both in the civil and criminal context, has historically been considered a sacred guarantee to be preserved for the people of the United States.

B. The Connecticut Constitution Provides That The Right Of Trial By Jury Shall Remain Inviolate

Article First, Section 19 of the Constitution of the State of Connecticut provides:

> The right of trial by jury shall remain inviolate.

It is well settled in Connecticut that litigants have a constitutional right to have issues of fact determined by a jury.[6] *See Seals v. Hickey,* 186 Conn. 337, 349-52, 441 A.2d 604 (1982).

In commenting upon the respect to be accorded the findings of a jury, the Connecticut Supreme Court itself has stated:

> *The right to a jury trial is fundamental in our judicial system, and this court has said that the right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room or a reasonable difference*

(Footnote continued.)

> The jury system, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.

Id. at 294.

[6]'Petitioners' common law causes of action are clearly within the protection afforded by Article First, Section 19 of the Constitution of the State of Connecticut. *Cf. Robertson v. Apuzzo,* 170 Conn. 367, 381, 365 A.2d 824 (1976).

> *of opinion among fair-minded men passed upon by the jury and not by the court. Schlag v. Paffney,* 103 Conn. 683, 685, 131 A. 420; see *Bailey v. Central Vt. Ry., Inc.,* 319 U.S. 350, 353, 63 S. Ct. 1062, 87 L.Ed. 1444, 47 Am. Jur. 2d, Jury §12. The action of the trial court is not to be disturbed unless it abused its legal discretion, and "[i]n determining this the unquestioned rule is that 'great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness.' *Dudas v. Ward Baking Co.,* 104 Conn. 516, 518, 133 A. 591; *Roma v. Thames River Specialties Co.,* 90 Conn. 18, 20, 96 A. 196." *Ardoline v. Keegan,* 140 Conn. 552, 555, 102 A.2d 352.

Camp v. Booth, 160 Conn. 10, 13, 273 A.2d 714 (1970) (emphasis added).

C. The Right To Due Process As Secured By The Fourteenth Amendment Incorporates The Right To A Trial By Jury

The Fourteenth Amendment has evolved and has been interpreted in such a manner so as to make fundamental rights applicable to the states. For example, in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897), the United States Supreme Court held that due process requires payment by a state of just compensation for private property taken for public use. The opinion of the Supreme Court was not based upon the concept that the guarantee of just compensation was a right contained in the Bill of Rights, but was instead premised on the fact that the right to be justly compensated amounted to:

> An affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by the jurists as a principle of universal law. Indeed, as a free

> government almost all other rights would become [utterly] worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

166 U.S. at 236, 17 S.Ct. at 584, 8 L.Ed. at 984. The rationale of "natural equity" was further articulated by the Court in *Twining v. New Jersey,* 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 92 (1908), where the Court held that fundamental rights are incorporated in the Fourteenth Amendment because they are of "such a nature that they are included in the conception of due process of law." 211 U.S. at 99, 29 S.Ct. at 20, 53 L.Ed. at 106.

The petitioners are not unmindful of the historical concern of the Supreme Court with the potential impact of an expanding due process concept.[7] However, in *Gitlow v. New York,* 268 U.S. 652, 45 S.Ct. 620, 69 L.Ed. 1138 (1925), this Court permitted the Fourteenth Amendment to incorporate fundamental rights when it announced that freedom of speech and of the

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[7]In *Palko v. Connecticut,* 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937), the Court recognized the Fourteenth Amendment as a vehicle for enforcing within the states selected portions of the Bill of Rights, but declined to uphold the petitioner's claim for protection against double jeopardy.

Subsequently, in *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947), Justice Black, in his dissenting opinion, concluded from his studies of the legislative history of the Fourteenth Amendment that the Fourteenth Amendment was designed to make the specifics of the Bill of Rights totally applicable to the states. In what has been viewed as the leading study on the legislative history of the Fourteenth Amendment as it related to incorporation of the Bill of Rights, the author concluded that the record "overwhelmingly" refuted Justice Black's thesis. Fairman, "Does the Fourteenth Amendment incorporate the Bill of Rights? The Original Understanding" 2 *Stan. L. Rev.* 5 (1949). Justice Black pointed out in *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 144, 20 L.Ed.2d 491 (1960), however, that "Professor Fairman's 'History' relies very heavily on what was not said in the state legislatures that passed on the Fourteenth Amendment . . . and most importantly [did not consider the statements] by men who actually sponsored the Amendment in the Congress." 391 U.S. at 165, 88 S. Ct. at 1455-56, 20 L.Ed.2d at 505.

press were fundamental guarantees immune from state invasion:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the first amendment from abridgement by Congress—are among the fundamental, personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.

268 U.S. at 666, 45 S.Ct. at 630, 69 L.Ed. at 1145.

Recent determinations of whether fundamental rights are applicable to the states through the due process clause of the Fourteenth Amendment have been premised upon the following criteria: (a) whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama,* 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158, 169 (1932); (b) whether a right is "basic in our system of jurisprudence," *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682, 694 (1948); (c) whether a right is "a fundamental right, essential to a fair trial," *Gideon v. Wainwright,* 372 U.S. 335, 343-44, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 805 (1963); (d) whether given the system of justice as it exists in the United States, the limitation of the right in question is not necessarily fundamental to fairness in every system that might be impinged, but is fundamental in the context of processes maintained by the states, *Duncan v. Louisiana, supra,* 391 U.S. at 149-50, n. 14; 88 S.Ct. at 1447-48, n. 14, 20 L.Ed.2d at 496, n. 14; and (e) whether a right or the limitation imposed upon it satisfies the requirement of "fundamental fairness." *Lassiter v. Department of Social Services,* 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640, 648 (1981).[8]

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[8]In *Lassiter v. Department of Social Services, supra,* the Court stated:

(Footnote continued on following page.)

While a state may regulate procedures under which its laws are carried out, a state's decision in this regard is not subject to proscription under the Due Process Clause "unless it offends some principle of justice so rooted in tradition as to be ranked as fundamental." *See Aetna Life Ins. Co. v. Lavoie, supra; Patterson v. New York,* 432 U.S. 197, 201-2, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977); *Speiser v. Randall,* 357 U.S. 513, 523, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

It is incontrovertible that the right to a trial by jury is fundamental to the American system of justice and contributes significantly to the concept of fundamental fairness. The right to trial by jury was important to our founding fathers because juries historically represented the layman's common sense, the "passional elements in our nature," and contributed to the administration of the law in accordance with the wishes, morals and values of the community. *See* Holmes, *Collected Legal Papers* at 237 (1st ed. 1920). Accordingly, in view of the historical significance of the right to trial by jury and the inclusion of "fundamental fairness" in the concept of due process, the Court should act to protect and preserve the petitioners' right to a trial by jury in the case *sub judice.*

(Footnote continued.)

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process *"is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743. *Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.*

452 U.S. at 24-25, 101 S.Ct. at 2158, 68 L.Ed.2d at 648 (emphasis added).

D. In State Court Actions Involving The Litigation Of Federal Rights, The Supreme Court Has Preserved The Jury's Factual Findings And Has Reversed The Actions Of Appellate Courts Which Have Attempted To Substitute Their Own Factual Findings For Those Of The Jury

In a number of instances in which actions brought pursuant to federal law have been litigated in state courts, the United States Supreme Court has not hesitated to reverse the actions of state appellate courts which have substituted their own findings of fact for those determined by a jury. The actions taken by the Court were taken in recognition of the fundamental right to trial by jury, an acknowledgment of the role that the jury should occupy as the ultimate arbiter of facts and an application of the concept of due process.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), the Court held that the factual findings of a state jury should be left undisturbed by a state appellate court.

A similar result, with similar language, was reached by the United States Supreme Court in *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). The Court in its opinion emphasized the critical role occupied by the jury in our system of justice:

> *It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of*

> *witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade,* 135 U.S. 554, 571, 572; *Tiller v. Atlantic Coast Line R. Co., supra,* 68; *Bailey v. Central Vermont Ry.,* 319 U.S. 350, 353, 354.

372 U.S. 114-15, 83 S.Ct. at 664, 9 L.Ed.2d at 624 quoting from *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944) (emphasis added).

In reversing the decision of the Ohio Court of Appeals, the Court concluded:

> *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. . . . The Court of Appeals therefore erred in refusing to accept the jury's verdict.*

372 U.S. at 115, 83 S.Ct. at 664, 9 L.Ed.2d at 624-25 (emphasis added).[9]

The decisions in *Rogers v. Missouri Pacific Railroad Co., supra* and *Gallick v. Baltimore & Ohio R.R. Co., supra* make

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[9]It should be noted that the rationale of the decisions articulated by the Supreme Court in *Rogers v. Missouri Pacific Railroad Co., supra,* and *Gallick v. Baltimore & Ohio R. K. Co., supra,* have also been applied by the Supreme Court to suits in state court under the Jones Act and the Boiler Inspection Act. *See, e.g., Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S. Ct. 415, 1 L.Ed.2d 404 (1957); *Harsh v. Illinois Terminal R. R. Co.*, 348 U.S. 940, 75 S. Ct. 362, 99 L.Ed. 736 (1955); *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L.Ed. 916 (1946).

clear the importance that the Supreme Court has placed on the fact finding function of the jury.[10]

E. The Court Should Promote The Confidence Of Litigants In State Courts

The petitioners are not suggesting that the Court incorporate the provisions of the Seventh Amendment in the prohibitions against the states provided by the Fourteenth Amendment. Rather, the petitioners claim that the right to a trial by jury and the right of litigants to have the jury's findings preserved on appeal is a fundamental right which is incorporated in the due process clause of the Fourteenth Amendment. *Accord., Aetna Life Ins. Co. v. Lavoie, supra.*

Nor are the petitioners asserting that they are entitled to a jury trial where none is provided. *Cf. United States Trust Co. v. Bohart,* 197 Conn. 34, 43, 495 A.2d 1034 (1985). The petitioners' right to a trial by jury in the case *sub judice* has been afforded.

Moreover, this is not a case where the petitioners are contesting a provision of a state constitution authorizing the appellate review of facts found by a jury. *Cf. Melancon v. McKeithen,* 345 F. Supp. 1025 (E.D.La. 1973) *aff'd sub nom Hill v. McKeithen,* 409 U.S. 943, 93 S. Ct. 290, 34 L. Ed. 214

[10]On a number of occasions, the United States Supreme Court has reversed the decisions of appellate courts which overturned jury verdicts on factual determinations. In the following cases the Supreme Court has granted *certiorari* and reversed the offending appellate decision without opinion: *See Gibson v. Phillips Petroleum Co.,* 352 U.S. 874, 77 S. Ct. 16, 1 L.Ed.2d 77 (1956); *Union Trust Co. v. Eastern Airlines, Inc.,* 350 U.S. 907, 76 S. Ct. 192, 100 L.Ed. 796 (1955); *Swafford v. Atlantic Coast Line R. Co.,* 350 U.S. 807, 76 S. Ct. 60, 100 L.Ed. 725 (1955); *Anderson, Admin. v. Atlantic Coast Line R. Co.,* 350 U.S. 807, 76 S. Ct. 60, 100 L.Ed. 725 (1955); *Williams v. Carolina Life Ins. Co.,* 348 U.S. 802, 75 S. Ct. 30, 99 L. Ed. 633 (1954).

(1972). The Constitution of the State of Connecticut already provides that "the right to trial by jury shall remain inviolate."

This is a case where the petitioners availed themselves of their right to a jury trial, where the jury has made factual findings in favor of the petitioners and where the appellate court has reversed the jury's verdict solely on factual determinations. Accordingly, the petitioners respectfully submit that the decision of the Connecticut Supreme Court substituting its own factual findings for the factual determinations of the jury is a denial of the petitioners' right to trial by jury, represents a denial of a fundamental right and constitutes a denial of due process.

The decision of the Connecticut Supreme Court will not only adversely affect the petitioners' rights, but will have ramifications on our judicial system. If uncorrected, the blatant disregard of a jury's findings in one of the longest civil jury trials in Connecticut history will impair the confidence of those who look to the courts of the State of Connecticut for a redress of grievances. Moreover, given a choice between the state and federal courts, Connecticut litigants will seek the federal forum to prevent their right to a trial by jury from being trampled by the Connecticut appellate courts. The docket of the federal courts is already congested and litigants should be encouraged to rely on their state courts. Such reliance will only occur when the state courts serve to protect and enforce fundamental rights.

Conclusion

A jury, selected after ten weeks of *voir dire*, who heard and observed over seventy witnesses, who examined over 200 exhibits, who viewed the petitioners' homes, who deliberated for ten days, who cogently and consistently responded to over 5,000 interrogatories, has rendered a verdict in favor of the petitioners. This jury of the petitioners' peers has performed its function and awarded the petitioners their recompense in the most exemplary tradition of our jurisprudence.

Yet, the Connecticut Supreme Court has overturned the jury's verdict and the judgment entered by the trial court based solely on a re-examination of factual findings. The Connecticut Supreme Court did not observe the demeanor of the witnesses or perform any of the other fact finding functions which were entrusted to the jury. The Connecticut Supreme Court merely concluded that the facts were different from those found by the jury.

When the petitioners commenced this civil action, they placed their trust in a judicial system where all persons stand equal before the law; where the facts of a dispute would be determined by a jury of their peers; and where the appellate courts of the State of Connecticut serve to uphold the right to a trial by jury. If the decision of the Connecticut Supreme Court is not reversed, the petitioners will be denied more than their judgment; they will be denied Justice.

The petitioners' right to due process as secured by the Fourteenth Amendment requires that the decision of the Connecticut Supreme Court be reversed. Justice dictates that the findings of the jury be upheld. This honorable Court represents the petitioners' only hope to have their right to a trial by jury protected and secured.

Respectfully submitted,

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Connecticut Supreme Court Decision.

BOUND BROOK ASSOCIATES ET AL. *v.* CITY OF NORWALK ET AL.

(12209)
(12212)

PETERS, C. J., HEALEY, SHEA, DANNEHY and SANTANIELLO, Js.

The plaintiffs sought damages from, inter alios, the named defendant city and the defendant G, the former building inspector of that city, in connection with the allegedly negligent design and construction of certain houses purchased by the plaintiffs. To avoid the special defense of the statute of limitations the plaintiffs had affirmatively pleaded that the defendants had fraudulently concealed the existence of their cause of action. On appeals by the city and by G from the judgment rendered on the verdicts returned by the jury against them, *held* that, as a matter of law, the plaintiffs failed to establish by "clear, precise, and unequivocal" evidence that the defendants had intended to conceal the existence of the cause of action; therefore, the jury could not reasonably and legally have concluded, as it did conclude, that the defendants fraudulently concealed the existence of the plaintiffs' cause of action, and the trial court erred in refusing either to direct a verdict in their favor or to render a judgment notwithstanding the verdicts.

Argued December 12, 1985—decision released February 18, 1986

Action to recover damages for, inter alia, the allegedly negligent design and construction of the plaintiffs' houses, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Landau, J.*; verdicts and judgment for the plaintiffs against all of the defendants except Louis J. Guardella, Inc., from which the defendant William R. Guarnieri and the named defendant appealed to this court. *Error; judgment directed.*

James V. Minor, deputy corporation counsel, for the appellant (named defendant).

Paul L. Blawie, with whom, on the brief, was *Karen Reynolds*, for the appellant (defendant William R. Guarnieri).

Alan R. Spirer and *Robert M. Davidson*, with whom was *Karan Spirer*, for the appellees (plaintiffs).

Philip M. Block filed a brief as amicus curiae.

PETERS, C. J. The principal issue on this appeal is whether the defendants, the city of Norwalk (hereinafter Norwalk), and William R. Guarnieri, the former chief building inspector for Norwalk, fraudulently concealed the existence of a cause of action so as to toll the running of a statute of limitations. The plaintiffs, owners and former owners of houses in the Bound Brook Estates subdivision in Norwalk, commenced a suit against the defendants[1] by complaint dated September 19, 1978. In that complaint, the plaintiffs alleged that the defendants were liable for negligence, nuisance, negligent nuisance, and fraudulent and reckless misrepresentations in connection with the construction of houses purchased by the plaintiffs. In order to avoid the defendants' special defenses that the plaintiffs' cause of action was time-barred, the plaintiffs affirmatively pleaded, pursuant to General Statutes § 52-595,[2] that the defendants had "fraudulently concealed from the plaintiffs [the] existence of their cause of action." Following a lengthy trial, the defendants unsuccessfully moved for directed verdicts in their favor. Subsequently, the jury returned verdicts for the plaintiffs against Norwalk and Guarnieri on all counts,[3]

[1] The plaintiffs are owners or former owners of fifty-nine houses in the subdivision. In this action, they joined as defendants Bound Brook Estates, Inc., the development company; Raymond Wennik, the president of Bound Brook Estates; Harry E. Bryan, the design engineer; Louis J. Gardella, Inc., the pile driver; the city of Norwalk; and William R. Guarnieri, the Norwalk building inspector. Bryan died prior to trial and his estate defaulted in this action.

[2] General Statutes § 52-595 provides: "FRAUDULENT CONCEALMENT OF CAUSE OF ACTION. If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

[3] Verdicts were also rendered against all but one of the other defendants. Bound Brook Estates, Inc., and Raymond Wennik were found liable by the jury and subsequently reached an agreement with the plaintiffs,

finding that, although the action had been brought more than three years from the acts and omissions in question, the statute of limitations had been tolled by fraudulent concealment on the part of the defendants.[4] Compensatory damages of approximately $2.3 million were awarded to the plaintiffs. Claiming that there was insufficient evidence to support the verdicts, the defendants moved the trial court to set aside the verdicts and to render judgment for the defendants notwithstanding the jury's verdicts. These motions were denied by the trial court on May 9, 1983, and the defendants have appealed. We find error.

The underlying facts are not in dispute. In 1965 and 1966, Bound Brook Estates, Inc. (hereinafter Bound Brook), received the approval of the city of Norwalk's planning commission and its common council to build a residential subdivision of 102 homes in Norwalk. Part of the land to be developed was a swamp composed of "soft, wet, marshy" soils. Bound Brook hired Harry E. Bryan, a well known professional engineer and surveyor of excellent reputation in the area, to plan the subdivision. Because of the soil conditions, Bryan determined that many of the houses would have to be built on pilings.

Subsequently, Raymond Wennik, president of Bound Brook, engineer Bryan, the defendant Guarnieri, and a deputy building inspector met to discuss the pending construction. At the time, Guarnieri had been chief building inspector of Norwalk for approximately eight

approved by the court, settling all claims against them for a total of $1.25 million. Only the defendant Louis J. Gardella, Inc., received a verdict in its favor. None of these defendants is a party to the present appeal.

[4] The plaintiffs have not challenged the jury's finding that the action was commenced more than three years from the acts and omissions in question and so would be barred by the statute of limitations absent fraudulent concealment by the defendants. In oral argument before this court, counsel for the plaintiffs conceded that the suit would be barred by the statute of limitations if fraudulent concealment were not established.

years. Although he had been involved in the residential construction business for a number of years, Guarnieri had no formal education in either engineering or architecture. Guarnieri discussed with Wennik and Bryan the building code[5] requirements for the construction of piling foundations, but indicated that neither he nor anyone on his staff had the professional engineering expertise necessary to evaluate or supervise the design and installation of the pilings.[6] Relying on provisions of the building code which permit the building inspector to accept reports and inspections by qualified experts outside the building department, Guarnieri arranged to have engineer Bryan assume responsibility for supervising the installation of the pilings and for certifying their compliance with the building code upon completion.

Following this meeting, Guarnieri issued building permits for the project, and construction began, with untreated wood pilings used to support many houses. In accordance with his regular practice, Guarnieri opened a separate file in the building department office for each house to be constructed. When completed, each file contained the building permit, with a notation on its face that the house had a wood pile foundation; the certificate of occupancy signed by Guarnieri, certifying substantial compliance with the building and zoning regulations of Norwalk; the inspection field sheet, recording periodic inspections of the house during the construction process; a plot plan; and a letter signed and sealed by engineer Bryan,[7] certifying that the pil-

[5] The city of Norwalk adopted the state building code in 1961, and this code was in effect throughout the period of construction of the subdivision.

[6] Two of the plaintiffs' expert witnesses testified that only a professional engineer or architect was capable of designing a piling system.

[7] The text of the letter of certification is as follows: "In accordance with Building Permit Applications filed in the Office of the Building Inspector, we certify to the following: The piling and the reinforced concrete foundation for house on lot ____ are in accordance with the plans filed with the

ing foundation had been constructed in accordance with both the building code and the piling plan on file in the building department. These files were open to public inspection. In mid-1969, construction on the houses ended and Guarnieri issued the final certificates of occupancy.

Shortly after construction had been completed, several houses in the Bound Brook subdivision developed serious settlement problems, necessitating the repiling of three of them by Bound Brook. Bound Brook neither applied for nor obtained building permits for this work. During the next few years, settlement problems of varying degrees developed in some additional houses, culminating in the collapse in 1976 of the ground floor of one house.

In 1977, Norwalk commissioned an engineering study of all the houses in the subdivision to determine the cause and extent of the problem and to attempt to find solutions. The study concluded that the wood pile foundations had been improperly designed, and that the use of untreated wood pilings had been inappropriate because of the fluctuating water table in the area. Following the release of this report, the plaintiffs filed the instant action.

On appeal from the judgment against them, Norwalk and Guarnieri both claim that the trial court erred in failing to direct a verdict in their favor, or to render judgment notwithstanding the verdicts, because the evidence produced at trial was insufficient to establish that they had fraudulently concealed from the plaintiffs the existence of a cause of action. Without proof of fraudulent concealment, the plaintiffs' cause of action was

Office of the Building Inspector of the City of Norwalk and are in accordance with the building code and ordinances of said City of Norwalk."

This letter was signed and sealed by Harry E. Bryan, registered professional engineer.

barred by the statute of limitations.[8] Because we find this claim of error to be well taken, we need not address the defendants' other assignments of error which challenge the trial court's rulings with regard to certain evidentiary matters, with regard to the instructions given to the jury, and with regard to sovereign immunity as a defense to Norwalk.[9]

To establish that the defendants had fraudulently concealed the existence of their cause of action and so had tolled the statute of limitations, the plaintiffs had the burden of proving that the defendants were aware of the facts necessary to establish this cause of action; *Puro* v. *Henry*, 188 Conn. 301, 311, 449 A.2d 176 (1982); and that they had intentionally concealed those facts from the plaintiffs.[10] *Zimmerer* v. *G. E. Company*, 126 F. Sup. 690, 693 (D. Conn. 1954); *Lippitt* v. *Ashley*, 89 Conn. 451, 480, 94 A. 995 (1915); see note, "Fraudulent Concealment of a Right of Action and the Statute of Limitations," 43 Harv. L. Rev. 471, 474 (1929); comment, "The Application of the Doctrine of Fraudulent Concealment to Modern Federal Trade

[8] General Statutes § 52-584 provides in relevant part: "LIMITATION OF ACTION FOR INJURY TO PERSON OR PROPERTY. No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ."

General Statutes § 52-577 provides: "ACTION FOUNDED UPON A TORT. No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

[9] The plaintiffs, pursuant to Practice Book § 3012 (a), challenge the trial court's instruction that reliance is a necessary element of fraudulent concealment. Because of our holding that the plaintiffs failed to prove intent to conceal, we do not address this claim.

[10] We do not decide whether affirmative acts of concealment are always necessary to satisfy General Statutes § 52-595, as the trial court instructed the jury, or whether a failure to act would be sufficient. See comment, "The Application of the Doctrine of Fraudulent Concealmen: to Modern Federal Trade Conspiracy Cases," 14 Conn. L. Rev. 115 (1981).

Conspiracy Cases," 14 Conn. L. Rev. 115, 127-28 (1981). The defendants' actions must have been "directed to the very point of obtaining the delay [in filing the action] of which [they] afterward [seek] to take advantage by pleading the statute." *Lippitt* v. *Ashley*, supra, 480; *Zimmerer* v. *G. E. Company*, supra, 693. To meet this burden, it was not sufficient for the plaintiffs to prove merely that it was more likely than not that the defendants had concealed the cause of action. Instead, the plaintiffs had to prove fraudulent concealment by the more exacting standard of " 'clear, precise, and unequivocal' " evidence; *Beckenstein* v. *Potter & Carrier, Inc.*, 191 Conn. 150, 163, 464 A.2d 18 (1983); *Puro* v. *Henry*, supra, 308; *Alaimo* v. *Royer*, 188 Conn. 36, 39, 448 A.2d 207 (1982).

The plaintiffs claim that they sustained this burden by establishing: (1) that Guarnieri, and through him Norwalk, issued the building permits and certificates of occupancy without first obtaining test results and affidavits required by the Building Code; (2) that a deputy building inspector signed misleading field inspection reports and filed them in the building department office; (3) that Guarnieri permitted the repiling of several houses without requiring building permits; and (4) that both Guarnieri and Norwalk later failed to investigate or to warn the plaintiffs or to revoke the certificates of occupancy when they became aware that settlement problems had developed in a number of houses. The defendants, on the other hand, claim that, even if these allegations were true, they do not establish that the defendants *intended to conceal* the cause of action from the plaintiffs. Since intent to conceal is an essential element of fraudulent concealment, they maintain that the plaintiffs have not sustained their burden of proof, and that the trial court erred in denying their motions for directed verdicts and for judgment notwithstanding the jury's verdicts.

Our review of a trial court's refusal to direct a verdict or to render judgment notwithstanding the verdict takes place within carefully defined parameters. We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial; *Bleich* v. *Ortiz*, 196 Conn. 498, 501, 493 A.2d 236 (1985); giving particular weight to the "concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony . . . ." *Chanosky* v. *City Building Supply Co.*, 152 Conn. 642, 643, 211 A.2d 141 (1965). The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion. *Bleich* v. *Ortiz*, supra, 500–501; *Pinto* v. *Spigner*, 163 Conn. 191, 192–93, 302 A.2d 266 (1972); *Chanosky* v. *City Building Supply Co.*, supra, 643. After a thorough review of the extensive evidence presented in this case, we conclude that the plaintiffs failed as a matter of law to meet their heightened burden of proving that the defendants fraudulently concealed the existence of the cause of action. The jury's verdict, therefore, cannot stand.

Contrary to the plaintiffs' claim, the evidence that Guarnieri issued building permits and certificates of occupancy without first obtaining affidavits and test data concerning the piling foundations does not prove an intent to conceal the facts underlying the present cause of action. The evidence presented at trial established that Guarnieri's failure to require the test data was prompted by his reliance on the representations of a professional engineer that the piling foundations met the code specifications. Such reliance on outside experts is specifically authorized by the code, especially in situations such as the instant one in which the building inspector lacks the technical expertise to handle a particular project. See Connecticut Basic Building Code

(1966) §§ 108.3, 111.4, 129.11 and 129.13. There was no evidence whatsoever that Guarnieri knew when he issued the building permits and certificates of occupancy that the piling foundations as designed and constructed were deficient or that the untreated wood pilings used were inappropriate for the area, nor was there any evidence that he intended to conceal these deficiencies. His acceptance of the engineer's conclusory certification of compliance without first obtaining affidavits and detailed test data may arguably have constituted a violation of some provisions of the building code, as the plaintiffs maintain. This conduct does not, however, without more, support a reasonable finding that Guarnieri intended to conceal from the plaintiffs the deficiencies in the piling foundations in order to delay their discovery of the cause of action.

In like manner, evidence that a deputy building inspector incorrectly completed field inspection reports fails to prove an intent to conceal the cause of action. There was no evidence whatsoever that the deputy was aware of any deficiencies in the construction of the piling foundations at the time he signed the reports. On the contrary, the evidence established that he relied on the engineer's representations that the construction satisfied code specifications when he made his reports. The plaintiffs conceded in oral argument before this court that there was no evidence that the defendant Guarnieri knew that the inspection reports contained misleading statements. Without such knowledge, he could hardly have intended to conceal the rights the plaintiffs now claim to have. For similar reasons, even if the deputy's actions could be deemed attributable to Norwalk, a question we do not decide, the deputy's possible misconduct does not establish an intent to conceal on the part of Norwalk.

Similarly, the evidence that Guarnieri failed to require building permits for the repiling of several

houses by Bound Brook from 1969 to 1971[11] does not support a reasonable inference that Guarnieri thereby intended to conceal the cause of action. The repiling process was a major undertaking involving the removal of each house from its foundation, the demolition of the concrete slab upon which it had rested, the installation of new pilings with a large and noisy diesel or drop hammer, and the replacement of the houses on newly constructed foundations. In view of the intensely public nature of this process, we conclude that Guarnieri's failure to require building permits, even if arguably evidentiary of negligence in enforcing the building code, cannot reasonably be construed as evidentiary of an intent to conceal the problems with the houses and thus to delay the plaintiffs' discovery of their cause of action.

Finally, the plaintiffs failed to establish that Guarnieri's subsequent failure to warn the plaintiffs about settlement problems or to revoke certificates of occupancy after problems had developed was motivated by an intent to conceal from the plaintiffs the existence of a cause of action in order to delay their filing suit.[12] Although Guarnieri became aware sometime between 1969 and 1971 that several houses then required repiling, the record does not clearly establish that he had notice of continuing problems in the subdivision until the ground floor of one house collapsed in 1976. At that point, Guarnieri ordered an investigation and ultimately declared two houses unsafe for occupancy. In the absence of any clear evidence that he knew of the problems before that time, his failure

[11] It was established that the building code requires permits for this type of repiling, and that Bound Brook never applied for them. It is unclear from the evidence whether Guarnieri learned of the repiling before it had begun, or after it was already underway.

[12] In view of our finding that this evidence does not establish an intent to conceal, we need not decide whether Guarnieri had a duty to investigate or to warn, or whether an intentional failure to act in such circumstances would be sufficient to establish fraudulent concealment.

to act earlier could not reasonably support a finding that he intended to conceal a cause of action from the plaintiffs.[13]

In short, after reviewing all of the evidence presented, we find as a matter of law that the plaintiffs did not sustain their burden of proof, and that the jury could not reasonably and legally have concluded that the defendants had fraudulently concealed from the plaintiffs the existence of their cause of action. Consequently, the plaintiffs' action was barred by the statute of limitations, and the trial court erred in failing either to direct verdicts in favor of the defendants or to render judgment for the defendants notwithstanding the verdicts.

There is error, the judgment is set aside, and the case is remanded to the trial court with instruction to render judgment in favor of the defendants Guarnieri and Norwalk.

In this opinion the other judges concurred.

[13] The plaintiffs also claim that Norwalk is liable because other members of the building depa:tment knew of problems in the subdivision and yet did nothing to correct them. We find no clear, unequivocal evidence that anyone in the building department was informed of continuing problems in the subdivision after the repiling of several of the houses from 1969 to 1971. It is not necessary for us to decide whether, even if they were aware of the problems, Norwalk had a duty to investigate or to warn because we find no evidence whatsoever that any alleged inaction was motivated by an intent to conceal from the plaintiffs the existence of the cause of action.

Instead, the only evidence on the issue indicated that, when Norwalk became aware of the seriousness of the problem in 1976, it held public hearings, authorized an engineering study which led to the filing of the instant action, and cooperated fully with the plaintiffs in their efforts to find solutions.

Order of Connecticut Supreme Court Denying Plaintiff's Motion for Reargument.

SUPREME COURT,

STATE OF CONNECTICUT.

March 4, 1986

No. 12212

BOUND BROOK ASSOCIATES, *et al.*

v.

CITY OF NORWALK, *et al.*

The motion of the plaintiffs filed February 27, 1986 to reargue, having been presented to the Court, it is hereby

ORDERED Denied.

By the Court,

CAROLYN G. CUNKE
Assistant Clerk—Appellate

Notice Sent: 3-4-86
Blawie, Belinkie & Varone
McNamara, Clancy & Kenney
Norwalk Corporation Counsel
Davidson, Driscoll & Naylor
Goldstein & Peck
Philip M. Block
Clerk, Stamford/Norwalk
(CV78-0037139)
Hon. Sidney Landau
Reporter of Judicial Decisions

Picture of the Shaw House, 46 Marlin Drive, Norwalk, Connecticut.

Picture of the Troy House, 53 Marlin Drive, Norwalk, Connecticut.

Instructive Interrogatories Submitted to Jury.

The following is representative of the interrogatories returned by the jury for each of the Plaintiffs in this appeal:

D.N. CV 78 0037139 S	: SUPERIOR COURT
BOUND BROOK ASSOCIATION, ET AL	: J.D. OF STAMFORD/ NORWALK
vs.	: AT STAMFORD
CITY OF NORWALK, ET AL	

INSTRUCTIVE INTERROGATORIES

GENERAL INSTRUCTIONS: These interrogatories should be completed before you reach a general verdict. The foreperson should complete the answers in ink. Of course, just as the jurors must be unanimous in reaching their verdict, so must they also be unanimous in their answers to the interrogatories. Please note that each of the interrogatories must be answered "yes" or "no".

AS TO THE PLAINTIFFS _____

As to the Defendant, City of Norwalk:

FIRST COUNT

1. Did the Plaintiffs prove that the Defendant, City of Norwalk was negligent in that:

a) Through its Planning Commission and Common Council it approved the Bound Brook Estates subdivision as being suitable for the construction of houses when it knew or should have known that the lots were not suitable for the construction of houses?

Yes —— No X

b) Through its Building Department, it issued a building permit for the Plaintiffs' house when it knew or should have known that the construction plans and

specifications submitted for building permits were not suitable for the construction of a house in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c) Through its Building Department, it issued a certificate of occupancy for the plaintiffs' house when it knew or should have known that the house was not constructed in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

(If the answer to questions 1(a), 1(b) and 1(c) are *all* NO, you must return a verdict in favor of the defendant, City of Norwalk on the First Count and the Second Count; then please answer question 17; if the answer to one or more of questions 1(a), 1(b) or 1(c) is Yes, please answer question 2.)

2. Did the plaintiffs prove that the act or acts of negligence found in the answers to questions 1(a), 1(b) or 1(c) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the First Count and the Second Count; then please answer question 17; If the answer is Yes, please answer questions 3 through 5.)

3. Do you find that the negligent acts of the Planning Commission were discretionary or ministerial?

Discretionary	Yes ——	No ——
(no response)		
Ministerial	Yes ——	No ——

4. Do you find that the negligent acts of the Common Council were discretionary or ministerial?

Discretionary	Yes ——	No ——
(no response)		
Ministerial	Yes ——	No ——

5. Do you find that the negligent acts of the Building Department were discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

(If you find that all of the above acts of the defendant, City of Norwalk were discretionary, you must find in favor of the defendant, City of Norwalk on the First Count and then go to Question 9; if you find that any of the above acts of the defendant, City of Norwalk were ministerial, please answer the next question.

6. Did the defendant, City of Norwalk prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 8.)

7. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the First Count, then go to question 9.)

8. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the First Count; If the answer to this question is Yes, then you must find the issues in favor of the plaintiffs on the First Count and go onto question No. 9.)

Second Count

9. Did the plaintiffs prove that the defendant, City of Norwalk, by its positive act or acts as found in response to question 1(a), 1(b) or 1(c) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk, on the Second Count, then please go to question 7; if the answer to this question is Yes, please answer question 10).

10. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Second Count; then please go to question 17; if the answer to this question is Yes, please answer question 14).

(Interrogatories 11-13 omitted by the Court.)

14. Did the defendant, City of Norwalk prove that the plaintiffs failed to bring suit within two years from the

date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question No. 16.)

15. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Second Count, then go to question 17.)

16. Did the Plaintiffs prove that the defendant, City of Norwalk fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Second Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Second Count and go onto question 17.)

Third Count

17. Did the plaintiffs prove that the defendant, City of Norwalk, by its act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Third Count, then go to Question 21; if the answer to this question is Yes, please answer question 18).

18. Did the Plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Third Count and then go to question 21. If the answer to this question is Yes, please answer the next question.)

19. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Third Count, then go to question 21.)

20. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Third Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Third Count and go onto Question 21.)

FOURTH COUNT

21. Did the plaintiffs prove that the defendant, City of Norwalk, made fraudulent representations and reckless misrepresentations to the plaintiffs as alleged in paragraph 24 of the Fourth Count of the Complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk on the Fourth Count, then go to question 25; if the answer to this question is Yes, please answer question 22.)

22. Did the plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, City of Norwalk, on the Fourth Count, then go to question 25; if the answer to this question is Yes, please answer question 23.)

23. Did the defendant, City of Norwalk prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fourth Count, then go to question 25.)

24. Did the Plaintiffs prove that the Defendant, City of Norwalk fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, City of Norwalk on the Fourth Count; if the answer to this question is yes, then you must find the issues in favor of the plaintiffs on the Fourth Count and go onto Question 25.)

AS TO THE DEFENDANT WILLIAM R. GUARNIERI:

FIFTH COUNT

25. Did the Plaintiffs prove that the Defendant, William R. Guarnieri was negligent in that:

a) he issued a building permit for the Plaintiffs' house when he knew or should have known that the proposed construction plans and specifications submitted for the building permit were not suitable for the construction of a house in compliance with the State of Connecticut Basic Building Code.

Yes X No ——

b) he failed to make adequate inspections of the Plaintiffs' house during construction?

Yes X No ——

c) he issued a certificate of occupancy for the Plaintiffs' house when he knew or should have known that the house did not comply with the provisions of the State of Connecticut Basic Building Code?

Yes X No ——

(If the answer to questions 25(a), 25(b) and 25(c) are all No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Fifth Count and the Sixth Count; if the answer to one or more of the questions 25(a), 25(b) or 25(c) is Yes, please answer question 26.)

26. Did the plaintiffs prove that the act or acts of negligence found in questions 25(a), 25(b) and 25(c) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Fifth Count and the Sixth Count; if the answer is Yes, please answer questions 27-29).

27. Do you find that the act of the defendant, William R. Guarnieri in issuing a building permit for the plaintiffs' house was discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

28. Do you find that the act of the defendant, William R. Guarnieri in failing to make adequate inspections of the plaintiffs' house during construction was discretionary or ministerial?

Discretionary	Yes X	No ——
Ministerial	Yes ——	No X

29. Do you find that the act of the defendant, William R. Guarnieri in issuing a certificate of occupancy for the plaintiffs' house was discretionary or ministerial?

Discretionary	Yes ——	No X
Ministerial	Yes X	No ——

(If you find that all of the above acts of the defendant, William R. Guarnieri were discretionary, you must find in favor of the defendant, William R. Guarnieri on the Fifth Count and then go to question 33; if you find that *any* of the above acts of the defendant, William R. Guarnieri were ministerial, please answer the next question).

30. Did the defendant, William R. Guarnieri prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 32).

31. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question: if the answer is No, then you must find the issues in favor of the plaintiffs on the Fifth Count, then go to question 33).

32. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for William R. Guarnieri on the Fifth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fifth Count and go on to question 33.)

SIXTH COUNT

33. Did the plaintiffs prove that the defendant, William R. Guarnieri by his positive act or acts as found in response to questions 25(a), 25(b) or 25(c) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 39, and you must return a verdict in favor of the defendant, William R. Guarnieri on the Sixth Count; if the answer to the question is Yes, please answer question 34).

34. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the injuries to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 39 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Sixth Count, if the answer to this question is Yes, please answer question 36).

36. Did the defendant, William R. Guarnieri prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 38).

37. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Sixth Count, then go to question 39).

38. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, William R. Guarnieri on the Sixth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Sixth Count and go onto question 39.)

SEVENTH COUNT

39. Did the plaintiffs prove that the defendant, William R. Guarnieri by his acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 43 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, please answer question 40).

40. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 43 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, please answer question 41).

41. Did the defendant, William R. Guarnieri prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Seventh Count, then go to question 43).

42. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, William R. Guarnieri on the Seventh Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Seventh Count and go onto question 43).

EIGHTH COUNT

43. Did the plaintiffs prove that the defendant, William R. Guarnieri made fraudulent representations and reckless misrepresentations as alleged in paragraph 24 of the Eighth Count?

Yes X No ——

(If the answer to this question is No, please go to question 47 and you must return a verdict in favor of the defendant, William R. Guarnieri on the Eighth Count; if the answer to this question is Yes, please answer question 44).

44. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, William R. Guarnieri on the Eighth Count; then go to question 47. If the answer to this question is Yes, please answer question 45).

45. Did the defendant, William R. Guarnieri prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Eighth Count, then go to Question 47).

46. Did the Plaintiffs prove that the Defendant, William R. Guarnieri fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the Defendant, William R. Guarnieri on the Eighth Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Eighth Count and then go onto question 47).

AS TO DEFENDANT, RAYMOND WENNIK:

NINTH COUNT:

47. Did the Plaintiffs prove that the defendant, Raymond Wennik was negligent in that:

a) He caused the tract of land known as Bound Brook Estates to be subdivided when he knew or should have known that the land was unsuitable for the construction of the plaintiffs' house?

Yes —— No X

b) He designed and constructed the plaintiffs' house in a manner that was not in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c) The pilings which were used to support the plaintiffs' house were sub-standard and unsuitable in that untreated pilings were used in a situation where they would extend above the water table and where treated pilings should have been used?

Yes X No ——

d) He used pilings which were too short?

Yes X No ——

e) The pilings were not driven to a sufficient depth?

Yes X No ——

(If the answer to Question 47(a) 47(b), 47(c), 47(d), 47(e), are *all* NO, please go to Question 57, and you must return a verdict in favor of Raymond Wennik on the Ninth and Tenth Counts; if the answer to one or more of questions 47(a), 47(b), 47(c) 47(d), 47(e), are Yes, please answer question 48).

48. Did the plaintiffs prove that the act or acts of negligence found in question 47(a), 47(b), 47(c), 47(d), 47(e) were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Ninth Count; if the answer is Yes, please answer Question 49).

49. Did the defendant, Raymond Wennik prove that the Plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 51).

50. Did the Defendant, Raymond Wennik, prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Ninth Count, then go to question 52).

51. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Ninth Count; if the answer to this question is Yes, then you must find the issues for the Plaintiffs on the Ninth Count and go onto question 52).

TENTH COUNT

52. Did the Plaintiffs prove that the defendant, Raymond Wennik by his act or acts as found in response to questions 47(a), 47(b), 47(c), 47(d), 47(e) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Tenth Count; if the answer to the question is Yes, please answer question 53).

53. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 57 and you must return a verdict in favor of the defendant, Raymond Wennik on the Tenth Count; if the answer is Yes, please answer question 54).

54. Did the defendant, Raymond Wennik prove that the Plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 56).

55. Did the defendant, Raymond Wennik prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Tenth Count, then go to question 57).

56. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Tenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Tenth Count, and go onto question 57).

ELEVENTH COUNT

57. Did the Plaintiffs prove that the defendant, Raymond Wennik by his act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 61 and you must return a verdict in favor of the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is Yes, please answer question 58).

58. Did the Plaintiffs prove that the nuisance was a proximate cause of the damages to the Plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 61 and you must return a verdict in favor of the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is Yes, please answer question 59).

59. Did the defendant, Raymond Wennik prove that the Plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Eleventh Count, then go to question 61).

60. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Raymond Wennik on the Eleventh Count; if the answer to this question is yes, then you will find the issues for the Plaintiffs on the Eleventh Count and go onto question 61.)

TWELFTH COUNT

61. Did the plaintiffs prove that the defendant, Raymond Wennik made fraudulent representations and reckless misrepresentations as alleged in Paragraph 24 of the Twelfth Count?

Yes X No ——

(If the answer to this question is No, please go to question 66 and you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, please answer question 62).

62. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, please go to question 66 and you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, please answer question 63).

63. Did the defendant, Raymond Wennik prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twelfth Count, then go to question 65).

64. Did the Plaintiffs prove that the Defendant, Raymond Wennik fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict in favor of the defendant, Raymond Wennik on the Twelfth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Twelfth Count and go onto the next question).

65. Did the plaintiffs prove that the defendant, Raymond Wennik acted wantonly?

Yes X No ——

(NOTE: The Thirteenth Count has been withdrawn).

AS TO THE DEFENDANT BOUND BROOK ESTATES, INC.:

COUNT FOURTEEN

66. Did the plaintiffs prove that the defendant, Bound Brook Estates, Inc., was negligent in that:

a. it caused the tract of land known as Bound Brook Estates to be subdivided when it knew or should have

known that the land was unsuitable for the construction of the plaintiffs' house?

Yes —— No X

b. it designed and constructed the plaintiffs' house in a manner that was not in compliance with the State of Connecticut Basic Building Code?

Yes X No ——

c. The pilings which were used to support the plaintiffs' house were substandard and unsuitable in that untreated pilings were used in a situation where such pilings would extend above the ground water table and where treated pilings should have been used?

Yes X No ——

d. it used pilings which were too short?

Yes X No ——

e. the pilings were not driven to a sufficient depth?

Yes X No ——

(If the answer to questions 66(a), 66(b), 66(c), 66(d), 66(e) are all No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fourteenth Count and the Fifteenth Count, if the answer to one or more of the question 66(a), 66(b), 66(c), 66(d), 66(e) is Yes, please answer question 67).

67. Did the plaintiffs prove that the act or acts of negligence found in questions 66(a), 66(b), 66(c), 66(d), 66(e), were a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fourteenth Count and the Fifteenth Count; if the answer is Yes, please answer question 68).

68. Did the Defendant, Bound Brook Estates, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 70).

69. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fourteenth Count, then go to question 71).

70. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Bound Brook Estates, Inc., on the Fourteenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fourteenth Count and go onto question 71.)

FIFTEENTH COUNT

71. Did the plaintiffs prove that the defendant, Bound Brook Estates, Inc., by its act or acts as found in response to Question 66(a), 66(b), 66(c), 66(d), 66(e) created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc. on the Fifteenth Count; if the answer to the question is Yes, please answer Question 72).

72. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 76 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Fifteenth Count; if Yes, please answer question 73).

73. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 75).

74. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Fifteenth Count, then go to Question 76).

75. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the defendant, Bound Brook Estates, Inc., on the Fifteenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Fifteenth Count and go onto Question 76).

SIXTEENTH COUNT

76. Did the Plaintiffs prove that the defendant, Bound Brook Estates, Inc., by its act or acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the Defendant, Bound Brook Estates, Inc., on the Sixteenth Count; if Yes, please answer question 77).

77. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 80 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Sixteenth Count;

if the answer to this question is Yes, please answer question 78).

78. Did the Defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act or omission which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer to this question is No, then you must find the issues in favor of the plaintiffs on the Sixteenth Count, then go to question 80).

79. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict for the Defendant, Bound Brook Estates, Inc., on the Sixteenth Count; if the answer to this question is Yes, then you will find the issues for the Plaintiffs on the Sixteenth Count and go onto Question 80).

SEVENTEENTH COUNT

80. Did the Plaintiffs prove that the defendant, Bound Brook Estates, Inc. made fraudulent representations and reckless misrepresentations as alleged in paragraph 24 of the Seventeenth Count?

Yes X No ——

(If the answer to this question is No, please go to question 85 and you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Seventeenth Count; if the answer to this question is Yes, please answer question 81).

81. Did the Plaintiffs prove that the above fraudulent representations and reckless misrepresentations were relied upon by them and induced them to purchase their house?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the SEVENTEENTH Count; if the answer to this question is Yes, please answer Question 82).

82. Did the defendant, Bound Brook Estates, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) complained of?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the Plaintiffs on the Seventeenth Count, then go to question 84).

83. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes X No ——

(If the answer to this question is No, then you must return a verdict in favor of the defendant, Bound Brook Estates, Inc., on the Seventeenth Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Seventeenth Count and go onto Question 84).

84. Did the Plaintiffs prove that the Defendant, Bound Brook Estates, Inc., acted wantonly?

Yes X No ——

(Note: The EIGHTEENTH COUNT has been withdrawn).

AS TO THE DEFENDANT, LOUIS J. GARDELLA, INC.

85. Did the Plaintiffs prove that the defendant, Louis J. Gardella, Inc., was negligent, in that:

a) It drove the pilings for the plaintiffs' house improperly?

Yes X No ——

b) It drove untreated pilings when it knew or should have known that such pilings would not be suitable for the support of the plaintiffs' house?

Yes —— No X

c) It drove pilings of insufficient length to support the plaintiffs' house?

Yes X No ——

d) It drove pilings of insufficient size and dimension to support the plaintiffs' house?

Yes —— No X

(If the answer to questions 85(a), 85(b), 85(c), 85(d) are all No, please go to question 95, and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Third Count and the Twenty-Fourth Count; if the answer to one or more of questions 85(a), 85(b), 85(c) or 85(d) is Yes, please answer question 86).

86. Did the plaintiffs prove that the act or acts of negligence found in question 85(a), 85(b), 85(c), 85(d) were a proximate cause of the damages to the Plaintiffs' property claimed in the Complaint?

Yes X No ——

(If the answer to this question is No, please go to Question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella on the Twenty-Third Count; if the answer is Yes, please answer question 87).

87. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 89).

88. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Third Count, then go to question 90).

89. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Third Count; if the answer to this question is Yes, then you will find the issues for the plaintiffs on the Twenty-Third Count and go onto question 90).

TWENTY-FOURTH COUNT

90. Did the plaintiffs prove that the defendant, Louis J. Gardella, Inc., by its act or acts as found in response to questions 85(a), 85(b), 85(c) or 85(d), created or participated in the creation of a negligent nuisance?

Yes X No ——

(If the answer to this question is No, please go to Question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if the answer to this question is Yes, please answer Question 91).

91. Did the plaintiffs prove that the negligent nuisance was a proximate cause of the damages to the plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, please go to question 95 and you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if Yes, please answer question 92).

92. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs failed to bring suit within two years from the date when the damage was first sustained or discovered or in the exercise of reasonable care should have been discovered?

Yes —— No X

(If the answer to this question is No, please answer the next question; if the answer is Yes, please answer question 94).

93. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to be negligent?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Fourth Count, then go to question 95).

94. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Fourth Count; if the answer to this question is Yes, then you must find the issues for the plaintiffs on the Twenty-Fourth Count then go onto Question 95).

TWENTY-FIFTH COUNT

95. Did the plaintiffs prove that the defendant, Louis J. Gardella, Inc., by its acts created or participated in the creation of a nuisance?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the Defendant, Louis J. Gardella, Inc., on the TWENTY-FIFTH COUNT; if Yes, please answer Question 96).

96. Did the plaintiffs prove that the nuisance was a proximate cause of the damages to the Plaintiffs' property claimed in the complaint?

Yes X No ——

(If the answer to this question is No, you must return a verdict in favor of the defendant, Louis J. Gardella, Inc., on the TWENTY-FIFTH COUNT; if Yes, please answer Question 97).

97. Did the defendant, Louis J. Gardella, Inc., prove that the plaintiffs did not commence this action within three years from the date of the act(s) or omission(s) which you found to constitute a nuisance?

Yes X No ——

(If the answer to this question is Yes, please answer the next question; if the answer is No, then you must find the issues in favor of the plaintiffs on the Twenty-Fifth Count).

98. Did the Plaintiffs prove that the Defendant, Louis J. Gardella, Inc., fraudulently concealed from the Plaintiffs the existence of this cause of action?

Yes —— No X

(If the answer to this question is No, then you must return a verdict for the defendant, Louis J. Gardella, Inc., on the Twenty-Fifth Count; if the answer is Yes, then you will find the issues for the Plaintiffs on the TWENTY-FIFTH COUNT).

_____

Foreperson